STATE OF MICHIGAN

IN THE SUPREME COURT

JOANN KUSMIERZ, KERRY KUSMIERZ, KIM LINDEBAUM, and **JAMES B. LINDEBAUM,**

Plaintiffs-Appellants,

v

JOYCE SCHMITT and **DIANE RANKIN,**

Defendants-Appellees,

and

RONALD SCHMITT,

Defendant.

Supreme Court
No. 130187

Court of Appeals
No. 258021

Bay County Circuit Court
No. 01-3467-CZ-C

David R. Skinner (P-20551)
Staci M. Richards (P-64566)
Skinner Professional Law Corporation
Attorneys for Plaintiffs-Appellants
101 First Street, Suite 105
P.O. Box 98
Bay City, Michigan 48707-0098
(989) 893-5547

Graham K. Crabtree (P-31590)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Defendants-Appellees
Joyce Schmitt and Diane Rankin
124 West Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

130187

APPELLEES' ANSWER TO APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Submitted by:

Graham K. Crabtree (P-31590)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Defendants–Appellees
Joyce Schmitt and Diane Rankin
124 West Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. DID THE DEFENDANTS WAIVE THEIR RIGHT TO APPEAL THE TRIAL COURT'S POST-JUDGMENT AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE, WHERE THAT AWARD WAS SATISIFIED BY WRIT OF GARNISHMENT?

The Court of Appeals has answered this question "No."

The Plaintiffs–Appellants contend the answer should be "Yes."

The Defendants–Appellees contend the answer is "No."

II. DID THE COURT OF APPEALS ERR IN REQUIRING APPORTIONMENT OF THE LUMP-SUM AWARD ELECTED BY THE PLAINTIFFS PURSUANT TO MCR 2.403(H)(4), IN ACCORDANCE WITH THE METHODOLGY ADOPTED IN ITS OPINION?

The Plaintiffs–Appellants contend the answer is "Yes."

The Defendants–Appellees contend the answer is "Yes."

III. WAS IT PERMISSIBLE FOR THE TRIAL COURT TO CONSIDER ITS POST-TRIAL AWARD OF INJUNCTIVE RELIEF AS A BASIS FOR AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE?

The trial court has answered this question "Yes."

The Court of Appeals has answered this question "No."

The Plaintiffs–Appellants contend the answer should be "Yes."

The Defendants–Appellees contend the answer is "No."

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IV. **WAS IT PERMISSIBLE FOR THE TRIAL COURT TO MAKE AN ADDITIONAL AWARD OF ATTORNEY FEES AS CASE EVALUATION SANCTIONS IN THIS CASE, WHERE EVIDENCE SUPPORTING PLAINTIFFS' CLAIM FOR ATTORNEY FEES AS AN ELEMENT OF DAMAGES HAD BEEN PRESENTED TO THE JURY AT TRIAL, THE JURY HAD RENDERED ITS AWARD OF ATTORNEY FEES BASED UPON THE EVIDENCE AND PROPER INSTRUCTIONS, AND THE TRIAL COURT HAD DENIED PLAINTIFFS' MOTION FOR ADDITUR RELATING TO THE CLAIMED INSUFFICIENCY OF THE ATTORNEY FEES AWARDED BY THE JURY?**

The trial court has answered this question "Yes."

The Court of Appeals did not address this question.

The Plaintiffs–Appellants contend the answer should be "Yes."

Defendants–Appellees contend the answer is "No."

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COUNTER-STATEMENT OF FACTS

Plaintiffs' Application for Leave to Appeal has arisen from a bitter family dispute.[1] Plaintiffs Joann Kusmierz and James Lindebaum are brother and sister, and Plaintiffs Kerry Kusmierz and Kim Lindebaum are their spouses. Defendants Joyce Schmitt and Diane Rankin are sisters of Plaintiffs Joann Kusmierz and James Lindebaum. Defendant Ronald Schmitt, who has not been a party to the appellate proceedings, is the husband of Joyce Schmitt.[2]

In June of 2001, Plaintiffs filed suit against Defendants in the Bay County Circuit Court,[3] alleging claims of Defamation, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Intentional Interference with Advantageous Business Relationships.

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[1] Although it may be freely acknowledged that the bitterness has been extreme, the merits of the underlying claims have no relevance to the issues presented in Plaintiffs' Application. Nonetheless, the Plaintiffs have devoted a considerable portion of their Statement of Facts to a superfluous discussion of the evidence presented at trial. This has been unnecessary because no appeal has been taken from the underlying Judgment or the trial court's separate Order for Injunctive Relief. Accordingly, this Application does not present any issue concerning the validity of the jury verdict or the trial court's subsequent decision to grant injunctive relief. The only issues presented are legal questions concerning: 1) the appropriateness of the trial court's subsequent decision to grant case evaluation sanctions against Defendants, and to deny Defendant Schmitt's request for case evaluation sanctions, and 2) the appropriateness of the Court of Appeals' rulings on these questions – issues which do not require any relitigation of the underlying claims. Plaintiffs' unnecessary elaboration upon the unfortunate history of this matter has been presented in a very transparent attempt to divert the Court's attention from the true issues presented in this case. Defendants trust that the Court will not permit its attention to be diverted in this matter.

[2] As the Court of Appeals has correctly noted, M Supply Company, a family business operated by Plaintiffs James and Kim Lindebaum, was originally named as a plaintiff in this action, but dismissed before trial.

[3] In the circuit court, the case was assigned to the Honorable William J. Caprathe, Circuit Judge.

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Plaintiffs' Complaint requested a money judgment, but contained no request for any form of equitable relief. Plaintiff's Complaint also contained a separate demand for jury trial.[4]

THE CASE EVALUATION

The case was submitted to case evaluation pursuant to MCR 2.403 on June 20, 2002. The case evaluators rendered a single award of $25,000.00 in favor of all Plaintiffs against Defendants Joyce Schmitt and Diane Rankin, and found no cause of action against Defendant Ronald Schmitt.[5] In accordance with MCR 2.403(K)(2), the award against Joyce Schmitt and Diane Rankin was broken down into separate components – $17,500.00 against Joyce Schmitt and $7,500.00 against Diane Rankin.[6] The award was accepted by Defendant Ronald Schmitt, but rejected by the Plaintiffs and Defendants Joyce Schmitt and Diane Rankin.[7]

THE JURY TRIAL AND THE JURY'S VERDICT

A jury trial, presided over by Judge Caprathe, was conducted over a period of 9 days in April of 2003. During the trial, Defendant's counsel asked the trial court to exclude evidence of attorney fees paid by the Plaintiffs in regard to these matters because Plaintiffs' Complaint had not included any request for an award of attorney fees, and their witness list had not identified any witness able to provide testimony as to the reasonableness of the fees charged. (Trial Transcript, hereinafter "T.," Vol. III, pp. 161-164; Vol. IV, pp. 4-7) In response to this request, Plaintiffs' counsel made a motion for leave to file an Amended

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[4] A copy of Plaintiffs' Complaint and Jury Demand has been submitted as Exhibit "D" of Plaintiffs' Application.

[5] The Plaintiffs elected to have their claims treated as a single claim pursuant to MCR 2.403(H)(4).

[6] See case evaluators' award – Exhibit "L" of Plaintiffs' Application.

[7] See ADR Clerk's Notice to the Parties Re: Acceptance or Rejection of Case Evaluation, submitted herewith as Appendix "A."

Complaint, seeking attorney fees as an element of damages pursuant to MCL 600.2911(7). (T. Vol. IV, pp. 8-10) This motion was granted over Defendants' objection, and an Amended Complaint was filed in accordance with the court's ruling on April 10, 2003, after the fifth day of trial (T., Vol. IV, pp. 10-15; Amended Complaint).[8]

Like the original Complaint, the Amended Complaint requested only a money judgment, with no request for any form of equitable relief. Like the original Complaint, the Amended Complaint demanded trial by jury.

To support his claim for attorney fees as an element of damages, Plaintiffs' trial counsel, David Skinner, subsequently provided his own testimony regarding the attorney fees incurred by the Plaintiffs for his services in this matter. (T., Vol. VI, pp. 65-93)[9] In his testimony given on April 9, 2003, Mr. Skinner identified a 13-page printout, admitted as Plaintiffs' Exhibit 28, which itemized attorney fees for services rendered to the Plaintiffs by himself and his firm for work done in relation to this matter from November 8, 2000 through April 7, 2003. That exhibit reflected billings for a total of 293 hours for services provided during that period, and indicated that a total of $53,942.60 had been billed for those services. A separate document, admitted as Plaintiffs' Exhibit 29, listed a total of $4,672.18 of billed costs. (T., Vol. VI, pp. 72-73) Mr. Skinner testified that these exhibits reflected the actual costs and attorney fees incurred by the Plaintiffs in this matter. (T., Vol. VI, p. 93)

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[8] A copy of Plaintiffs' Amended Complaint has been submitted as Exhibit "G" of Plaintiffs' Application.

[9] Prior to Mr. Skinner's testimony, Defendants' counsel objected, out of the presence of the jury, to Mr. Skinner being allowed to present testimony in this matter. This objection was based, in part, upon the fact that Mr. Skinner had never been listed as a witness. This objection was also overruled. (T. Vol. VI, pp. 57-60)

In his closing argument, Plaintiffs' counsel addressed the issue of attorney fees and costs, and requested an award of the full amount identified in his testimony. (T. Vol. IX, pp. 68, 73) Defendants' counsel suggested, in his closing, that if attorney fees were to be awarded, they should be limited to the amount actually paid, and that the award be apportioned among the Plaintiffs in accordance with the amount of damages recovered by each. (T. Vol. IX, pp. 99-100) In its instructions to the jury, the trial court instructed, in accordance with M Civ JI 50.01, that the jury should determine the amount of money which would "reasonably, fairly, and adequately" compensate the Plaintiffs, and that the elements of damage should include costs and actual attorney fees, including any costs and attorney fees to be incurred in the future. (T. Vol. IX, pp. 125-126, 146)

At the conclusion of the trial, the jury awarded the Plaintiffs a total of $22,000.00. Of that amount, $11,000.00 was allocated to Defendant Diane Rankin, $9,000.00 to Defendant Joyce Schmitt, and $2,000.00 to Defendant Ronald Schmitt.[10] In each of the verdict forms, the jury was asked to specify the amounts awarded as attorney fees. Out of the total award, $10,000.00 was awarded for attorney fees – $5,000.00 to Plaintiff James Lindebaum, and $5,000.00 to Plaintiff Kim Lindebaum. The remainder was awarded for noneconomic damages – $5,000.00 to Plaintiff James Lindebaum, $5,000.00 to Plaintiff Kim Lindebaum, $1,000.00 to Plaintiff Kerry Kusmierz, and $1,000.00 to Plaintiff JoAnn Kusmierz. No exemplary damages were awarded.

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[10] The jury's findings, the amounts awarded as damages, and the apportionment of the awarded damages between the Defendants, were specified in separate jury verdict forms completed with regard to each of the four Plaintiffs. Copies of those verdict forms have been submitted as Exhibit "F" of Plaintiffs' Application.

The total adjusted verdict for the Plaintiffs, including their costs and interest from the filing of their Complaint to case evaluation, was $23,315.54.[11] Thus, on the basis of the verdict rendered, the Plaintiffs did not improve their position. Defendant Joyce Schmitt improved her position at trial, but Defendant Diane Rankin did not. Accordingly, based upon the verdicts rendered by the jury, the Plaintiffs should not have been entitled to case evaluation sanctions, and case evaluation sanctions should have been awarded to Defendant Joyce Schmitt. *See:* MCR 2.403(O)(1).

THE POST-TRIAL MOTIONS AND ENTRY OF THE FINAL JUDGMENT

After the verdict, Plaintiffs sought to avoid paying Defendant Schmitt's attorneys fees and to improve their position so that they could instead receive case evaluation sanctions. Two strategies were employed for these purposes. First, Plaintiffs filed a motion for new trial/additur, in which they maintained that *additur* should be awarded, or a new trial granted, because the amount of attorney fees awarded by the jury was far less than the amount requested.[12] Second, the Plaintiffs filed a motion for injunctive relief, requesting that the Defendants be permanently enjoined from engaging in a number of types of harassing conduct enumerated therein.[13]

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[11] This was acknowledged by Plaintiffs on page 2 of their Brief in Support of Plaintiffs' Response to Defendant Joyce Schmitt's Motion for Case Evaluation Sanctions. The calculation establishing this amount as the adjusted verdict was set forth in Exhibit C of that document, a copy of which is submitted herewith as Appendix "B."

[12] *See*: Plaintiffs' Motion for Additur or Partial New Trial and Judgment Notwithstanding the Verdict, dated May 2, 2003.

[13] *See*: Plaintiffs' Motion for Permanent Injunction, dated May 5, 2003.

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These motions were argued and taken under advisement, on June 5, 2003. In a written Opinion and Order subsequently issued on December 19, 2003,[14] the trial court denied Plaintiffs' motion for new trial/additur, noting that the amount awarded by the jury for attorney fees was within the range supported by the evidence presented at trial. (Opinion and Order of December 19, 2003, pp. 3-7). The court granted Plaintiffs' motion for injunctive relief, however, despite the fact that no form of injunctive relief had been requested in either of their complaints. (Opinion and Order of December 19, 2003, pp. 8-10)

A separate written Order for Injunctive Relief was subsequently entered, in accordance with the trial court's Opinion and Order of December 19, 2003, on February 9, 2004.[15] Pursuant to that Order, the Defendants were enjoined, for a period of three years, from sending letters or packages to Plaintiffs' residences or places of employment, coming within ¼ mile of Plaintiffs' residences, and putting anything in Plaintiffs' mailboxes or driveways. A written final Judgment was entered, awarding damages in accordance with the jury's verdict, on February 10, 2004.[16] No appeals were taken from either of these orders.

THE MOTIONS FOR CASE EVALUATION SANCTIONS

Following the entry of the trial court's final Judgment, the Plaintiffs filed a motion for assessment of case evaluation sanctions.[17] In that motion, Plaintiffs argued that, although the adjusted verdict in their favor was less than the total case evaluation award, they had improved their position, and Defendant Joyce Schmitt had not, by virtue of the court's

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[14] A copy of the trial court's Opinion and Order of December 19, 2003 has been submitted as Exhibit "J" of Plaintiffs' Application.

[15] Plaintiffs' Application, Exhibit "K."

[16] Plaintiff's Application, Exhibit "E."

[17] See Plaintiffs' Motion to Determine Case Evaluation Sanctions and supporting brief.

subsequent award of injunctive relief. In their motion and supporting brief, Plaintiffs requested that the trial court award $86,298.30 (375.21 hours x $230.00 per hour) for attorney fees incurred since the case evaluation.[18]

The Defendants objected to Plaintiffs' request, and Defendant Joyce Schmitt filed her own motion for assessment of case evaluation sanctions.[19] Defendants argued that it would be inappropriate to consider the court's post-trial grant of injunctive relief as a basis for an award of case evaluation sanctions in this case because: 1) The order granting that relief was not a part of the "verdict" for purposes of determining liability for case evaluation sanctions; 2) No request for equitable relief was made in either of the Plaintiffs' Complaints, and no such request was considered by the case evaluators; and 3) The motion for injunctive relief was not filed until after the jury's verdict had made it plain that it was Defendant Joyce Schmitt, not the Plaintiffs, who should be entitled to case evaluation sanctions.

Defendants also argued that it would be inappropriate for the court to make an additional award of attorney fees as case evaluation sanctions because evidence supporting Plaintiffs' claims for attorney fees as an element of damages had been presented to the jury at trial over Defendants' objections, the jury had rendered its award of attorney fees based upon the evidence presented, and Plaintiffs' motion for *additur* relating to the claimed insufficiency of the attorney fees awarded had been denied.

[18] A printout listing all of the attorney fees billed by Mr. Skinner and his firm for services rendered in this matter from November 8, 2000 through March 8, 2004 was presented as Exhibit E of Plaintiffs' Brief in Support of Case Evaluation Sanctions. A copy of that printout has been submitted as Appendix "N" of Plaintiffs' Application.

[19] See Defendants Brief in Response to Plaintiffs Motion to Determine Case Evaluation Sanctions; Brief in Support of Motion for Case Evaluation Costs; Defendants' Memorandum of Law.

The motions for case evaluation sanctions were argued before the trial court and taken under advisement on May 7, 2004, and the court's ruling was announced during further proceedings subsequently conducted on July 6, 2004. (Motion Hearing Transcript, 7-6-04. pp. 18-21) The trial court rejected Defendants' argument that its post-trial Order for Injunctive Relief could not be used as a basis for an award of case evaluation sanctions in this case, incorrectly noting that "I believe that the language in the complaint, which states that the plaintiff requests all other reliefs as necessary is sufficient for this court to consider the equitable relief received." (Motion Hearing Transcript, 7-6-04. p. 19)[20] Thus, based upon the adjusted verdict, enhanced by unspecified value attributed to its post-trial Order for Injunctive Relief, the trial court concluded that Plaintiffs' request for case evaluation sanctions should be granted, and Defendant Joyce Schmitt's request denied.

The trial court also rejected Defendants' claim that an additional award of attorney fees as case evaluation sanctions was inappropriate in light of the jury's consideration and award of attorney fees as an element of Plaintiffs' damages, but indicated that the amount awarded as case evaluation sanctions would be reduced by the amount previously awarded by the jury. (Motion Hearing Transcript, 7-6-04. p. 19-20)

Accordingly, by a written Order entered on August 31, 2004, the trial court awarded Plaintiffs case evaluation sanctions in the amount of $67,259.60.[21] By an Amended Order subsequently entered on September 8, 2004, the court clarified that the award of case

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[20] The Court should note that no such language appears in either of the Plaintiffs' Complaints. Indeed, the trial court had previously acknowledged, in its Opinion and Order of December 19, 2003. that "injunctive relief was not specifically requested in either Complaint."(Opinion and Order of December 19, 2003, p. 9)

[21] Plaintiffs' Application, Exhibit "B."

evaluation sanctions was against Defendants Diane Rankin and Joyce Schmitt only, and denied Defendant Joyce Schmitt's motion for case evaluation sanctions.[22]

THE WRIT OF GARNISHMENT

As Plaintiffs have noted, an amount of money sufficient for payment of the underlying Judgment **and** the trial court's subsequent award of case evaluation sanctions was seized by the Plaintiffs by writ of garnishment prior to the entry of the written orders appealed from in these proceedings. The money was taken by writ of garnishment from death benefits which were owed to Defendant Diane Rankin by Primerica Life Insurance Company as a result of the death of her husband. Wishing to obtain this money before it could be paid to Ms. Rankin, Plaintiffs filed an Ex Parte Motion for Restraining Order on or about July 19, 2004, requesting that Primerica be restrained from making payment until further order of the court.[23]

A conference call was conducted between the court and counsel with regard to this motion on or about July 20, 2004, and the court directed Plaintiffs' counsel to submit a garnishment to the court to obtain funds from Primerica in the amount of $92,063.52. This directive was memorialized by a written Order (incorrectly dated August 13, 2004), which also directed that the garnished funds be placed in Plaintiffs' counsel's trust account until further order of the court.[24] Pursuant to that Order, Plaintiffs' counsel obtained the writ of garnishment, dated July 26, 2004, submitted as Exhibit "P" of Plaintiffs' Application.

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[22] Plaintiffs' Application, Exhibit "M."

[23] Copies of Plaintiff's Motion for Ex Parte Restraining Order, together with supporting Affidavit of Plaintiff's counsel and proposed Ex Parte Restraining Order, are submitted herewith as Appendix "C."

[24] Plaintiffs' Application, Exhibit "Q."

An Amended Order to Hold Funds in Escrow and Release Remaining Funds was subsequently entered on August 9, or 11, 2004. (Both dates appear on the face of the Order.)[25] Like the original Order, this Amended Order decreed that the garnished funds be held in Plaintiffs' counsel's trust account until further order of the court.[26]

Because these funds have already been seized by writ of garnishment, it was not necessary for Defendant to seek a stay of execution pending appeal. If their appeal should ultimately be successful, the Plaintiffs will be required to repay those funds with interest pursuant to MCL 600.1475, which provides that "In case any amount is collected on any judgment or decree, if such judgment or decree be afterward reversed the court shall award restitution of the amount so collected, with interest from the time of collection."

As Plaintiffs have noted, a Satisfaction of Judgment was executed by Plaintiffs' counsel and filed with the court on or about September 13, 2004.[27] That Satisfaction of Judgment, prepared by Defendants' trial counsel, states that the underlying Judgment entered on February 10, 2004 was satisfied on September 7, 2004, "including all interest, costs, and case evaluation sanctions," but contains no specific reference to the subsequent Orders at issue in this appeal – the post-judgment Orders of August 31, 2004 and September 8, 2004. A motion for release of other garnishments obtained by the Plaintiffs in regard to this matter,

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[25] A copy of the trial court's Amended Order to Hold Funds in Escrow and Release Remaining Funds is submitted herewith as Appendix "D."

[26] The Orders appealed from (the trial court's Orders of August 31, and September 8, 2004) contained no authorization for any disbursement of these funds from Plaintiffs' counsel's trust account before the expiration of the 21-day appeal period. Any disbursement within that time was in violation of the automatic stay provision of MCR 2.614(A).

[27] Plaintiffs' Application, Exhibit "C."

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filed by Defendants' trial counsel on or about October 11, 2004, suggests that trial counsel requested the issuance of the aforementioned Satisfaction of Judgment in order to foreclose any subsequent requests for additional case evaluation sanctions, and to secure the release of other outstanding garnishments.

Plaintiffs have incorrectly claimed that Defendant Rankin expressed an intention to waive her appellate remedies prior to the entry of the aforementioned Satisfaction of Judgment. On pages 18 and 38, Plaintiffs have claimed that Ms. Rankin stated, in correspondence of August 25, 2004 (Plaintiffs' Application, Exhibit "R"), that she did not intend to further challenge the trial court's Order granting case evaluation sanctions. This claim is simply untrue. The Court should note, first of all, that the Exhibit "R" referred to is not a statement by Ms. Rankin, as Plaintiffs have suggested; it is, instead, a letter from her trial counsel, George Holmes, addressed to Maureen Middleton, Assistant General Counsel of Primerica Life Insurance Company. That letter merely stated that Ms. Rankin did not oppose the company's disbursal of the funds in accordance with the trial court's Order of August 9, 2004 (the Amended Order directing the issuance of a writ of garnishment and the holding of the funds in Plaintiffs' counsel's trust account) and that she did not intend to appeal or challenge **that Order**.[28] Second. it is plain that this communication, made in response to an inquiry from the insurance company, does not refer to the trial court's Order awarding case evaluation sanctions, because that Order, and the court's subsequent Amended Order were not entered until later (August 31, and September 8, 2004, respectively). The letter of August 25,

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[28] The fact that the money was later turned over to Plaintiffs' counsel pursuant to the writ of garnishment is no evidence of Ms. Rankin's alleged intent to waive her appellate remedies. Clearly, the insurance company was not at liberty to condition compliance with the trial court's writ of garnishment on receiving an assurance that Ms. Rankin did not intend to appeal the trial court's order awarding case evaluation sanctions.

2004 submitted as Plaintiffs' Exhibit "R" does not contain any language signifying any intent, on Ms. Rankin's part, to abandon her right to appeal the trial court's award of case evaluation sanctions. To the contrary, the letter states that "Ms. Rankin may choose to challenge any disbursement from the respective trust accounts, but that would not be your issue."

DEFENDANTS' APPEAL TO THE COURT OF APPEALS

Defendants Joyce Schmitt and Diane Rankin appealed the trial court's post-judgment Orders of August 31, 2004 and September 8, 2004 to the Court of Appeals as of right. Their Claim of Appeal was timely filed on September 20, 2004. Thus, the Court of Appeals had jurisdiction pursuant to MCL 600.308(1)(a), MCR 7.203(A)(1), and MCR 7.202(6)(a)(iv).

On October 20, 2005, Plaintiffs filed a motion to dismiss Defendants' appeal, based upon their claim that Defendants' right to appeal had been waived by the prior payment of the case evaluation award. Defendants filed a response in opposition, arguing that the satisfaction of the award by writ of garnishment was not a voluntary payment of the judgments appealed from, and thus, did not constitute a waiver of Defendants' right to appeal. On November 30, 2004, the Court of Appeals issued its Order denying Plaintiffs' motion to dismiss.[29] Plaintiffs did not seek leave to appeal that Order to this Court.

The Defendants raised three claims of error in their appeal to the Court of Appeals. In their first issue, they contended that the trial court had improperly relied upon its order granting Plaintiffs' post-trial motion for injunctive relief as a basis for its award of case evaluation sanctions. Specifically, they contended that: 1) MCR 2.403(O)(5) did not permit the trial court to consider its supplemental order for injunctive relief to determine Plaintiffs'

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[29] A copy of the Court of Appeals' Order of November 30, 2004 is submitted herewith as Appendix "E."

entitlement to case evaluation sanctions in this case; 2) The trial court's post-trial order for injunctive relief was improperly considered a part of the "verdict" for purposes of determining liability for case evaluation sanctions under MCR 2.403(O)(1); 3) It was inappropriate for the trial court to consider its supplemental order for injunctive relief as a basis for an award of case evaluation sanctions because Plaintiffs had made no request for injunctive relief in their pleadings, and thus, the case evaluators had not considered any such request in determining their award; and 4) The trial court's reliance upon its post-trial order for injunctive relief as a necessary basis for its award of case evaluation sanctions was not "fair under all the circumstances," as required by MCR 2.403(O)(5)(b).

In their second claim of error, Defendants contended that the trial court's award of attorney fees as case evaluation sanctions had impermissibly infringed upon Defendants' constitutionally guaranteed right to trial by jury in this case, where evidence supporting plaintiffs' claim for attorney fees as an element of damages had been presented to the jury at trial, the jury had rendered its award of attorney fees based upon the evidence and proper instructions, and the trial court had denied plaintiffs' motion for *additur* relating to the claimed insufficiency of the attorney fees awarded by the jury. In their third claim of error, Defendants contended that the trial court had erred in denying Defendant Joyce Schmitt's motion for case evaluation sanctions because Ms. Schmitt had improved her position at trial, while the Plaintiffs did not.

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On November 15, 2005, the Court of Appeals reversed the trial court's orders and remanded the case to the trial court for further proceedings in an Opinion designated for publication. (Plaintiffs' Application, Exhibit "A") At the outset, the Court rejected the jurisdictional challenge renewed in Plaintiffs' Appellees' Brief, holding that "because the

judgment was involuntarily satisfied through a variety of garnishments, defendants did not waive their right to appeal, and therefore the appeal is not moot." (Court of Appeals Opinion, p. 5, fn 5)

In its Opinion, the Court of Appeals agreed that Defendants were "technically correct in arguing that MCR 2.403(O)(5) does not, by its terms, contemplate the situation presented here," but concluded that "the trial court did not err in using MCR 2.403(O)(5) as a guide for this case, even though, by its terms, it does not technically apply." (Court of Appeals Opinion, p. 6) The Court also rejected Defendants' argument that the trial court's supplemental order for injunctive relief did not constitute a part of the "verdict" for purposes of determining liability for case evaluation sanctions. (Court of Appeals Opinion, p. 6)

Nonetheless, the Court of Appeals concluded that it was not fair "under all the circumstances" for the trial court to consider its supplemental award of injunctive relief as a basis for its award of case evaluation sanctions because: 1) The Plaintiffs' claim for injunctive relief was not considered by the case evaluators, and 2) The jury had awarded attorney fees as an element of damages, and its award had been upheld against Plaintiffs' motion for *additur*:

> "Defendants next argue that consideration of the value of equitable relief to award sanctions in this case is not "fair . . . under all of the circumstances." MCR 2.403(O)(5)(b). We agree, for a couple of reasons.
>
> "First, MCR 2.403(K)(3) allows case evaluators to consider claims for equitable relief ("The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award."). Thus, evaluators presented with a case in which the plaintiffs seek "equitable relief" may place a value on that relief and augment the overall evaluation award accordingly. That approach makes legitimate a later comparison between the evaluation and a verdict that also includes a value for equitable relief. Defendants maintain that the case evaluation panel did not consider plaintiffs' request for injunctive relief when it issued its decision, and that certainly appears to be the case. Plaintiffs' complaint and amended complaint did not mention any request for injunctive relief, and the trial court was simply mistaken in suggesting that these pleadings were sufficiently vaguely or broadly worded to constitute such a

request. Because the value of injunctive relief was not considered by the evaluators, the case evaluation in favor of plaintiffs may well have come in artificially low and, as a result, the difference between it and the verdict (which did include the value of injunctive relief) was greater than it should have been.

"Further, as summarized above, the jury heard evidence and arguments regarding plaintiffs' claims for attorney fees under MCL 600.2911(7) and rendered an award of attorney fees after being properly instructed. The jury's decision in this regard was reviewed and found appropriate by the trial judge in denying plaintiffs' motion for additur. In light of that, it was not "fair . . . under . . . the circumstances" of this case for the trial court to later award additional attorney fees as actual costs under MCR 2.403(O)(5). Under the circumstances of this case, we conclude that the trial court erred by taking into account the value of the equitable relief it had ordered in awarding costs against defendants under MCR 2.403(O)(5).

(Court of Appeals Opinion, p. 7)

The Court of Appeals did not address Defendants' argument that the trial court's additional award of attorney fees as case evaluation sanctions impermissibly infringed upon their constitutionally guaranteed right to trial by jury. And, despite its finding that it was not fair "under all the circumstances" for the trial court to award case evaluation sanctions based upon its supplemental order for injunctive relief in light of the jury's prior award of attorney fees as an element of damages, the Court of Appeals ultimately concluded that it was, nevertheless, appropriate to award case evaluation sanctions in favor of Plaintiffs James and Kim Lindebaum. The Court determined, however, that the trial court had improperly failed to base its award upon a comparison of the amounts of the evaluation and verdict as to particular pairs of parties. Thus, applying its own methodology for calculating a proportional apportionment of the individual evaluations and adjusted verdict among the parties, the Court determined that Defendants Schmitt and Rankin were liable for payment of case evaluation sanctions to Plaintiffs James and Kim Lindebaum, while Plaintiffs Joann and Kerry Kusmierz

were liable for payment of case evaluation sanctions to Defendants Schmitt and Rankin. (Court of Appeals Opinion, pp. 7-10)

Having made these determinations, the Court of Appeals ordered that the case be remanded to the trial court for further consideration and entry of new orders consistent with its Opinion. (Court of Appeals Opinion, p. 10)

On December 6, 2005, Defendants Schmitt and Rankin filed a timely Motion for Reconsideration of the November 15, 2005 decision of the Court of Appeals. In that motion, Defendants reminded the Court that it had neglected to address their claim that the trial court's supplemental award of attorney fees as case evaluation sanctions had impermissibly infringed upon their constitutional right to jury trial, and asked that the Court grant reconsideration to consider and rule upon that issue. Defendants' Motion for Reconsideration also challenged the Court's methodology for apportionment of the awards and adjusted verdict between the individual pairs of parties. Defendants noted, in this regard, that the Court's methodology was inconsistent with the language of the pertinent court rules, unsupported by reported authority, and fundamentally unfair to the Defendants, who were never afforded an opportunity to accept or reject separate awards for individual Plaintiffs.

On January 13, 2006, the Court of Appeals entered its Order denying Defendants' Motion for Reconsideration.[30]

Plaintiffs filed their present Application for Leave to Appeal on December 22, 2005, while Defendants' Motion for Reconsideration was pending in the Court of Appeals. On February 24, 2006, the Defendants filed their own timely Application for Leave to Appeal

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[30] A copy of the Court of Appeals' January 13, 2006 Order denying Defendants' motion for reconsideration is submitted herewith as Appendix "F."

following the denial of their Motion for Reconsideration. Defendants' Application is currently pending before this Court under Docket No. 130574.

LEGAL ARGUMENT

I. THE STANDARDS OF REVIEW

Plaintiffs have incorrectly stated that a trial court's decision whether to grant case evaluation sanctions is reviewed for abuse of discretion. It has become well settled that this issue presents a question of law, which must be reviewed *de novo*. Cusumano v Velger, 264 Mich App 234; 690 NW2d 309 (2004); Campbell v Sullins, 257 Mich App 179, 197; 667 NW2d 887 (2003); Great Lakes Gas Transmission Limited Partnership v Markel, 226 Mich App 127, 129; 573 NW2d 61 (1997).

It is also well settled that questions of law are reviewed *de novo*. Halloran v Bhan, 470 Mich 572; 683 NW2d 129 (2004); Bartlett v North Ottawa Community Hospital, 244 Mich App 685; 625 NW2d 470 (2001) *lv den*, 465 Mich 907 (2001) The interpretation and application of court rules is a question of law, reviewed by this Court *de novo*. Haliw v City of Sterling Heights, 471 Mich 700, 704; 691 NW 2d 753 (2005); Campbell v Sullins, *supra*, 257 Mich App at 198.

All of the issues raised in Plaintiffs' Application for Leave to Appeal present questions of law. Those issues must therefore be reviewed *de novo*.

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II. THE DEFENDANTS DID NOT WAIVE THEIR RIGHT TO APPEAL THE TRIAL COURT'S POST-JUDGMENT AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE, WHERE THAT AWARD WAS SATISIFIED BY WRIT OF GARNISHMENT.

In their present Application, Plaintiffs have again suggested that Defendants waived their right to appeal by payment of the trial court's award of case evaluation sanctions. This claim was properly rejected by the Court of Appeals, and should be rejected by this Court as well. Defendants did not waive their right to appeal the trial court's Orders awarding case evaluation sanctions, as Plaintiffs have claimed, because the amount awarded has been collected by writ of garnishment, and thus, has not been voluntarily paid. Thus, the Court of Appeals had jurisdiction to hear Defendants' appeal, since an actual case or controversy was presented for decision.

Although it has often been held that the right to appeal may be waived by a voluntary payment of the judgment appealed, "[T]he question whether payment of a money judgment cuts off the payor's right of appeal depends upon whether or not the payment of the judgment is under legal compulsion." 39 ALR 2d 153, § 4. Thus, if a defendant involuntarily pays a judgment due to legal compulsion, she does not waive her right to appeal – only voluntary payment of a judgment will render the defendant's appeal moot.

Michigan's reported decisions follow this rule, as shown by this Court's decision in Watson v Kane, 31 Mich 61 (1875) and the Court of Appeals' decision in Industrial Lease-Back Corp. v Twp. of Romulus, 23 Mich App 449, 452; 178 NW2d 819 (1970). In Watson, the Court held that the defendant was not barred from prosecuting a writ of error after payment of an execution on the judgment because the payment was not voluntary. Similarly, in Industrial Lease-Back Corp, the Court of Appeals held that:

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"The generally prevailing rule that **voluntary** payment or performance of a judgment bars appellate challenge is well established in Michigan. **It may be, however, that payment or performance following the invocation or threatened exercise of a court's contempt power should not be regarded as voluntary or as constituting a waiver of the right to challenge the court's order.**"

23 Mich App at 452 (Emphasis added)

Thus, it has become clear that the payment of a judgment after contempt is threatened or invoked is not voluntary. It is equally clear that payment of a judgment by execution is also involuntary and does not waive a party's right to appeal: "Outside of Kansas, the courts agree that payment following the issuance of execution upon a judgment does not cut off the payor's right to appeal." 39 ALR 2d 153, § 6. *See also*: Industrial Lease-Back Corp., *supra*, at 453 n. 3 ("Payment after a writ of execution is not voluntary.")

Defendants wish to note in this regard, that this Court's decision in Horowitz v Rott, 235 Mich 369; 209 NW 131 (1926) does not support Plaintiffs' claim, on page 42 of their Application, that "The fact that the payment was made as a result of executed garnishments is of no consequence." In Horowitz, the judgment at issue was paid under protest, and it was this, that the Court found to be "of no moment." 235 Mich at 371. There is obviously a great difference between paying a judgment under protest and having it involuntarily collected by writ of garnishment. Indeed, the Court noted, in Horowitz, that the defendant "chose by his voluntary act" to satisfy the judgment. 235 Mich at 372.

The Court should note, as well, that Plaintiffs' reliance upon Amerisure Insurance Company v Auto-Owners Insurance Company, 262 Mich App 10; 684 NW2d 391 (2004) is also misplaced because that case did not involve any issue concerning waiver of the right to appeal. That case involved the very different issue of whether the defendant was liable for

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judgment interest accrued during appellate proceedings, where he had offered to pay the amount owing to the Clerk of the Court to hold during the appellate proceedings.

Decisions from other jurisdictions have also applied the aforementioned general rule that payment of a judgment by garnishment is involuntary, and does not waive a party's right to appeal. In Kinser v Elkadi, 654 SW2d 901 (Mo. 1983), the court had to decide whether the defendant's right to appeal was waived after his insurer paid the total amount due under its policy to the plaintiffs. After the plaintiffs had been awarded a verdict against the defendant, they filed a writ of garnishment in aid of execution against defendant's insurer, and twenty minutes later the insurer paid the entire garnishment amount into court. 654 SW2d at 902. The plaintiffs then challenged the defendant's appeal as moot, arguing that because the judgment had been paid, the defendant waived his right to appeal. The court disagreed, and held that the defendant did not waive his right to appeal because the insurer's payment of the judgment was not voluntary:

> **"When a defendant pays a judgment after execution or writ of garnishment in aid of execution has issued, courts have generally held that the payment was involuntary. The inference is strong that a judgment paid after execution or garnishment has issued was paid as the result of legal coercion."**
>
> Id. at 903 (Emphasis added - citations omitted)

Similarly, in Countryman v Seymour R-II School Dist., 823 SW2d 515 (Ct App Mo 1992), the court held that garnishment is not a voluntary payment that would preclude appeal:

> "[I]t is sufficient to note that **when payment is made following an execution or garnishment, courts have generally held that the payment was involuntary. In that situation the inference is strong that the payment was made as a result of legal coercion."**
>
> 823 SW2d at 519 (Emphasis added – citations omitted).

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Likewise, Reardon Office Equipment v Nelson, 409 NW2d 222 (Ct App Minn. 1987) has also held that payment by garnishment is not voluntary and does not constitute a waiver of appeal. In that case, after the plaintiffs were granted a default judgment they served a notice of execution of levy on defendant's bank and garnished defendant's account. After receiving their money, plaintiffs then returned the writ of execution to the court saying the judgment was satisfied in full, and the court issued a satisfaction of judgment to the plaintiffs. Defendant then learned of the default judgment and garnishment, and promptly filed an answer, motion to vacate the judgment and motion to change venue. The lower court denied the motion to vacate, stating that because the judgment was paid and satisfied, it lacked subject matter jurisdiction because there was no case or controversy.

The Minnesota Court of Appeals disagreed with the lower court, and held that the lower court did have subject matter jurisdiction. It stated:

> "Here, **appellants did not voluntarily satisfy the judgment entered against them. On the contrary, respondent was forced to execute a writ and garnish appellants' bank account to satisfy the judgment. Under these circumstances, there was no waiver of appellants' right to appeal by voluntary satisfaction of the judgment.**"
>
> 409 NW2d at 224 (Emphasis added).

Reardon Office Equipment also makes clear another important point: entry of a Satisfaction of Judgment after securing payment of a judgment by execution or garnishment does not cut off the defendant's right to appeal. In that case, the fact that the plaintiffs obtained a Satisfaction of Judgment from the court after garnishing the defendant's account did not cut off the defendant's right to appeal.

A similar result was reached in Ryan v Engelke, 285 SW2d 6 (Ct App Mo 1955). In that case, the defendant appealed a decision of the circuit court denying defendant's appeal from the magistrate court. The plaintiff had sued the defendant in the magistrate court on a

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contract action and the magistrate court entered judgment on the plaintiff's behalf. Defendant then appealed the decision to the circuit court, but during the pendency of the appeal, the plaintiff garnished part of the judgment from one of defendant's debtors, and then told the defendant it would execute judgment against defendant's real property to satisfy the remaining balance. In order to avoid the levy, defendant paid plaintiff the remaining balance, but told the plaintiff that she was still planning to appeal. On the date of appearance in the circuit court for the appeal, the plaintiff filed a motion for satisfaction of the magistrate court's judgment and to dismiss defendant's cause of action with prejudice. The circuit court ordered satisfaction of judgment and dismissed the case. Defendant then filed a motion to set aside the order.

The Ryan court held that the order of the lower court allowing the plaintiff to acknowledge full satisfaction of judgment and dismissing the cause of action should be reversed because it deprived the defendant of her right to appeal:

> "Under the evidence in this case defendant, although she could have appealed with bond and have avoided the threat of an execution, elected to perfect her appeal without bond. This she had a right to do under the present statute. **It hardly seems fair or just to say that under such circumstances [plaintiff] could satisfy the judgment and have the cause dismissed by reason of payment either through the process of an execution or by the act of [defendant] in paying the same to prevent a levy upon her property and thus deprive [defendant] of the right to have the cause retried in Circuit Court."**
>
> 285 SW2d at 10 (Emphasis added)

The Court concluded by saying that "[t]his is not the intent of the law as it now stands. [Defendant] has the right to have her appeal heard and the dismissal and full satisfaction of the judgment was premature to say the least." *Id.*

In the case of Burton v Hinton, 426 So2d 192 (Ct App La 1982), the court held that a defendant could not be prevented from appealing, despite the entry of a Satisfaction of

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Judgment. In that case, the plaintiff and defendant were involved in a car/motorcycle accident and each party filed suit against the other. An uninsured passenger in the car also filed suit against the motorcyclist. The court dismissed the actions between the car driver and motorcyclist because it found both the them negligent, but found that the passenger could recover against the motorcyclist and car driver's insurer. The motorcyclist appealed the judgment. Two weeks later the insurance company paid the judgment to the plaintiff in exchange for a Satisfaction of Judgment releasing the motorcyclist and the insurance company, and then moved to have the motorcyclist's appeal dismissed. However, the court of appeals held:

> "The appeal of a final judgment is a matter of right. Appeals are favored by our law and should be maintained wherever possible. We do not agree with mover that the matter is now moot, just because mover has satisfied [the passenger's] judgment. [The motorcyclist] still has his interest in having the issue of negligence decided in his favor. He should be accorded an opportunity to present the question of negligence for review."
>
> 426 So2d at 193.

In this case, it is clear that the Defendants have not waived their right to appeal because they have not voluntarily paid the judgment of case evaluation sanctions. The Plaintiffs executed on the judgment for sanctions by obtaining a writ of garnishment, which was served upon the life insurance company indebted to Defendant Rankin. The payment of the judgment was therefore "under legal compulsion," and can in no way be considered voluntary.

There is no basis for Plaintiffs' claim, on pages 42-43, that Defendants had a choice of paying the judgment or posting an appeal bond. It has become well settled that there is no requirement that a party appealing to the Court of Appeals post any form of bond unless that party seeks a stay of proceedings or a stay of execution pending appeal. *See:* Sanchez v

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Lagoudakis, 450 Mich 864; 539 NW2d 377 (1995); Denton v Winiemko, 434 Mich 904; 453 NW2d 680 (1990); Wright v Fields, 412 Mich 227; 313 NW2d 902 (1981). It was not necessary for the Defendants to seek a stay of execution pending appeal in this case, because the full amount required to pay off the trial court's award of case evaluation sanctions was seized by a writ of garnishment and deposited into Plaintiffs' counsel's trust account pursuant to the trial court's Amended Order to Hold Funds in Escrow and Release Remaining Funds, entered on or about August 11, 2004.[31] If the Defendants should ultimately prevail in these proceedings, the Plaintiffs will be required to repay those funds with interest pursuant to MCL 600.1475, which provides that:

> "In case any amount is collected on any judgment or decree, if such judgment or decree be afterward reversed the court shall award restitution of the amount so collected, with interest from the time of collection."

Because the Defendants did not obtain a stay of execution, the Plaintiffs had a choice. They could have awaited the final appellate disposition authoritatively declaring their rights in this matter, or pursue execution of the judgment without delay, with the attendant risk that they could ultimately be required to pay restitution under MCL 600.1475 if unsuccessful on appeal. Plaintiffs chose the latter course, for which they cannot be faulted, but having done so, they must accept the fact that the Defendants have appellate remedies which might ultimately divest them of their gain.

None of this is changed by the Satisfaction of Judgment entered after the involuntary collection of the award. That document merely memorialized the full involuntary payment of

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[31] The Court should note that it would have been difficult for the Defendants to pursue a motion for stay in this case, where the trial court improperly granted its writ of garnishment before entry of its written orders awarding case evaluation sanctions in this matter, and before the expiration of the 21-day appeal period, in violation of the automatic stay provision of MCR 2.614(A).

the award and, as noted previously, the circumstances clearly suggest that its entry was sought in order to foreclose any subsequent requests for additional case evaluation sanctions, and to secure the release of other outstanding garnishments. Neither of these objectives are consistent with a desire to waive available appellate remedies.

And, as noted previously, there is also no basis for Plaintiffs' present claim that Defendant Rankin expressed a desire to waive her appellate remedies. At best, the correspondence submitted as Plaintiffs' Exhibit "R" merely expresses an acknowledgement that Ms. Rankin did not intend to challenge the trial court's garnishment. It contains nothing whatsoever suggesting any intention or desire to waive appellate review of the underlying award of case evaluation sanctions.

Under these circumstances, there has been no waiver of Defendants' right to appeal, and thus, Plaintiffs' Motion to Dismiss was properly denied. Further review of this issue by this Court is therefore unwarranted.

III. THE COURT OF APPEALS ERRED IN REQUIRING APPORTIONMENT OF THE LUMP-SUM AWARD ELECTED BY THE PLAINTIFFS PURSUANT TO MCR 2.403(H)(4) IN ACCORDANCE WITH THE METHODOLGY ADOPTED IN ITS OPINION.

At the conclusion of the lengthy jury trial conducted in this case, the jury awarded the Plaintiffs less than the lump-sum previously awarded by the case evaluators pursuant to MCR 2.403(H)(4). Indeed, the total of the amounts awarded to all of the Plaintiffs, adjusted as required by MCR 2.403(O)(3), was still considerably less than the total lump-sum awarded by

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the case evaluators.[32] Nonetheless, the trial court ordered Defendants Schmitt and Rankin to pay the Plaintiffs $67,259.60 in case evaluation sanctions, based upon its consideration of additional unspecified value attributed to its post-trial Order for Injunctive Relief.[33] Although the Court of Appeals agreed that it was inappropriate for the trial court to base its award of case evaluation sanctions upon its separate Order for Injunctive Relief, it concluded that an award in favor of Plaintiffs James and Kim Lindebaum was appropriate, based upon its own newly-devised methodology for apportionment of the lump-sum award and the individual verdicts.

Plaintiffs have maintained that the methodology devised by the Court of Appeals for apportionment of the lump-sum award and the individual verdicts is inappropriate. The Defendants agree, for different reasons. Plaintiffs contend that their entitlement to case evaluation sanctions cannot be based upon an apportionment of the lump-sum award into individual awards in favor of each of the individual Plaintiffs. They have suggested, however, that the lump-sum award can be apportioned, based upon the separate awards rendered against each Defendant pursuant to MCR 2.403(K)(2), to determine their entitlement to case evaluation sanctions as to each individual Defendant under the second sentence of MCR 2.403(O)(1). Defendants contend that the trial court's decision should have been reversed in

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[32] As noted previously, the Plaintiffs elected to be treated as a single party with a single claim pursuant to MCR 2.403(H)(4), and the lump-sum case evaluation award to the Plaintiffs was $25,000.00. Under MCR 2.403(O)(3), a verdict is considered more favorable to the plaintiff if the adjusted verdict is more than 10 percent above the amount of the evaluation. Thus, to be considered more favorable to the Plaintiffs in this case, the adjusted jury verdict would have to be $27,500.00 or more. As noted previously, the adjusted verdict was only $23,315.54. (Appendix "B")

[33] The trial court based its award of case evaluation sanctions upon the additional unspecified value attributable to its post-trial Order for Injunctive Relief because it properly recognized that the adjusted verdict was insufficient to satisfy the threshold established under the second sentence of MCR 2.403(O)(1). (Motion Hearing Transcript, 7-6-04. p. 19)

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its entirety because none of the Plaintiffs were entitled to an award of case evaluation sanctions in this case, where the adjusted verdict was less than the lump-sum award elected by the plaintiffs pursuant to MCR 2.403(H)(4).

A. THE COURT OF APPEALS HAS IMPROPERLY DEVISED A METHODOLOGY FOR APPORTIONMENT OF THE LUMP-SUM CASE EVALUATION AWARD WHICH IS INCONSISTENT WITH THE LANGUAGE OF THE PERTINENT COURT RULES, UNSUPPORTED BY REPORTED AUTHORITY, AND FUNDAMENTALLY UNFAIR TO THE DEFENDANTS, WHO WERE NEVER AFFORDED AN OPPORUNITY TO ACCEPT OR REJECT SEPARATE AWARDS FOR THE INDIVIDUAL PLAINTIFFS.

Under MCR 2.403(O)(1), a party who has rejected a case evaluation award must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. An additional requirement applies, however, where both parties have rejected. In that case, a party who has rejected the award may still be awarded case evaluation sanctions against the opposing party if the opposing party is liable for payment of sanctions, *i.e.*, the verdict was **not** more favorable to the opposing party than the case evaluation award, **and** the verdict **was** more favorable to the party requesting sanctions than the case evaluation award:

> "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation."

On its own motion, and without benefit of briefing by the parties, the Court of Appeals raised the question of whether a lump-sum case evaluation award rendered under MCR 2.403(H)(4) must be apportioned between multiple plaintiffs to determine liability for payment of case evaluation sanctions under MCR 2.403(O)(1) in cases such as this, where the

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plaintiffs and defendants have both rejected the award. Having considered the issue in this fashion, the Court concluded that the lump-sum award must be apportioned equally between all of the Plaintiffs in this case, and that the apportioned awards must then be used to determine whether each individual Plaintiff has improved his or her position under MCR 2.403(O)(1), as to each individual Defendant. With all due respect to the Court of Appeals, the Defendants contend that this conclusion was erroneous for a number of reasons.

First, the Court of Appeals has cited no case authority for its construction of MCR 2.403(O)(4)(a), and this writer has found no authority supporting that construction.

Second, the Court's interpretation of MCR 2.403(O)(4)(a) conflicts with the clear language of subrules (H)(4) and (O)(1), and impermissibly renders the lump-sum award option meaningless under the circumstances appearing in this case. MCR 2.403(H)(4) affords multiple plaintiffs an opportunity to elect a single lump-sum award in cases such as this, where the case involves claims of multiple injuries to members of a single family.[34] If multiple plaintiffs elect a lump-sum award, they pay only a single case evaluation fee. If they desire separate awards, they must each pay a separate case evaluation fee. If multiple

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[34] The Court of Appeals has noted that Plaintiffs' claims were treated as one claim by stipulation of the parties and questioned whether it was appropriate to do so under the circumstances of this case. (Court of Appeals Opinion, p. 2, fn. 1) Defendants contend that the result in this case should not depend upon whether Plaintiffs were entitled to a lump-sum award under MCR 2.403(H)(4), or obtained that award by stipulation. The end result would have been the same either way. Plaintiffs were not required to pay the multiple case evaluation fees that they would have been required to pay to obtain separate awards, and the case evaluators rendered a single lump-sum award in favor of all of the Plaintiffs, which the Defendants were required to accept or reject *in toto*. Moreover, the Court should bear in mind that MCR 2.403(H)(4) gives the option of choosing a lump-sum award to the Plaintiffs alone, in cases where the option applies. Thus, the methodology adopted in the Court of Appeal's published decision will be binding upon defendants in future cases, whether they have agreed to a lump-sum award or not.

plaintiffs elect a single lump-sum award under MCR 2.403(H)(4), the defendants must accept or reject that award *in toto*:

> "(4) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the case evaluation panel will then make separate awards for each claim, which may be individually accepted or rejected."

The Court should note, in this regard, that defendants are not permitted the option of choosing a lump-sum award against all defendants. MCR 2.403(K)(2) requires that the evaluation "must include a separate award as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action." The breakdown of the lump-sum award into separate awards against Defendants Schmitt and Rankin was evidently made in accordance with this requirement. That breakdown was necessary to allow for the subsequent determination of whether the verdict was, or was not, more favorable to each of them than the case evaluation. It is reasonable to assume that the requirement of separate awards against individual defendants was included in subrule (K)(2) for that reason.

The Court of Appeals' conclusion that MCR 2.403(O)(4)(a) requires an apportionment of the lump-sum award made under MCR 2.403(H)(4) overlooks the fact that, by its plain terms, subrule (H)(4) treats the claims of multiple plaintiffs as a single claim.[35] Because that subrule plainly requires a single award for multiple claims that are treated as a single claim, it

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[35] It has become well settled that, when called upon to construe a court rule, this Court applies the legal principles governing the construction and application of statutes. Thus, the Court begins with the plain language of the rule in question. When the language is unambiguous, the Court enforces the meaning expressed, without further judicial construction or interpretation. Haliw v City of Sterling Heights, *supra*, 471 Mich at 704-705; Grievance Administrator v Underwood, 462 Mich 188, 193-194; 612 NW 2d 116 (2000)

stands to reason that the multiple plaintiffs who elect a lump-sum award should be treated as a single "party" for purposes of subrule (O)(4)(a) and the second sentence of subrule (O)(1).[36] Similarly, a single lump-sum award made in favor of plaintiffs who elect it should be considered "the case evaluation" for purposes of the second sentence of subrule (O)(1).

If subrules (O)(1) and (O)(4)(a) are interpreted and applied in this manner, a sensible and harmonious result is achieved. When a lump-sum award is elected under subrule (H)(4), the plaintiffs (as a group) and the defendants must both accept or reject that single award. If the plaintiffs accept, they cannot be subject to an award of case evaluation sanctions. If the plaintiffs and the defendants both reject, the plaintiffs' entitlement to case evaluation sanctions will depend upon: 1) Whether the verdict against each defendant is more favorable to that defendant than the specific award rendered against each individual defendant pursuant to subrule (K)(2); **and** 2) Whether the total adjusted verdict is more favorable to the plaintiffs than "the case evaluation," *i.e.*, the lump-sum award made pursuant to subrule (H)(4), as required by the second sentence of subrule (O)(1).

Plaintiffs have maintained that the interpretation of MCR 2.403(O)(4)(a) adopted by the Court of Appeals in this case defeats their choice to be treated as a single party. The Defendants agree. The Court's erroneous interpretation also renders the election of a lump-sum award under MCR 2.403(H)(4) meaningless to defendants because the plaintiffs would be given the benefit of equally apportioned awards in favor of each plaintiff – ***awards that the***

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[36] Plaintiffs have acknowledged that they elected to be treated as a single party pursuant to MCR 2.403(H)(4) for purposes of the case evaluation conducted in this case. On page 23 of their Application, Plaintiffs have stated that "MCR 2.403(H)(4) allows members of a single family to elect to treat the action as one claim with payment of one fee and the rendering of one lump-sum award to be accepted or rejected. **The parties in this case stipulated that the Plaintiffs would be treated as a single party – this is not in dispute.**" (Plaintiff's Application, p. 23 – Emphasis added)

case evaluators never made – without being required to pay for, or accept or reject, such individual awards.

The Court of Appeals' interpretation of MCR 2.403(O)(4)(a) is also fundamentally unfair to the Defendants because **application of the Court's methodology holds them responsible for rejections that they did not make.** As noted previously, the defendants must accept or reject the award *in toto* when a single lump-sum award is elected by the plaintiffs under subrule (H)(4). They are not given an opportunity to accept or reject individual awards in favor of each individual plaintiff, and thus, the Defendants in this case did not have an opportunity to accept or reject the neatly apportioned individual awards fashioned according to Court of Appeals' newly–announced methodology. Had they been afforded that opportunity, it is entirely possible that they might have accepted the awards made in favor of some of the Plaintiffs while rejecting the awards made in favor of others, based upon the relative strengths and weaknesses of each Plaintiff's individual claims. It is entirely possible, for example, that the Defendants might have accepted the individual awards made in favor of James and Kim Lindebaum while rejecting the individual awards in favor of Joann and Kerry Kusmierz and M. Supply Co. In that event, the Defendants would not have been liable for case evaluation sanctions at all.

The Defendants respectfully submit that it is fundamentally unfair, and indeed, a clear denial of their right to due process of law, for a court to hold them responsible in this manner for rejection of apportioned awards that they did not make, and indeed, were never given the opportunity to accept or reject. Under the circumstances appearing here, the Plaintiffs must be considered a single party, and the single lump-sum award that **they** have elected must be deemed "the case evaluation" for purposes of determining their entitlement to case evaluation

sanctions under the second sentence of MCR 2.403(O)(1). The total adjusted verdict in this case was not more favorable to the Plaintiffs than that award; indeed it was considerably less. This being the case, the requirement established under the second sentence of subrule (O)(1) was not satisfied, and accordingly, none of the Plaintiffs were entitled to an award of case evaluation sanctions in this matter.

Plaintiffs contend, however, that the lump-sum award must be apportioned based upon the individual awards rendered against each of the Defendants pursuant to MCR 2.403(K)(2) to determine whether the threshold provided in the second sentence of subrule (O)(1) has been satisfied with regard to each individual Defendant. Thus, Plaintiffs contend that they are entitled to an award of case evaluation sanctions against Defendant Rankin, whose position was not improved, even though the total adjusted verdict is substantially less than the lump-sum awarded by the case evaluators.[37] This interpretation should be rejected for two reasons. First, as noted previously, the plain language of subrule (H)(4) requires that plaintiffs be considered a single party, with a single claim, when they have elected to be treated in this manner under that provision.

Second, Plaintiffs' proposed interpretation is also inconsistent with the underlying purpose of the case evaluation court rules – to encourage settlement of claims through mutual acceptance of case evaluation awards. The lump-sum award rendered in this case afforded the Plaintiffs an opportunity to settle this entire matter for a payment of $25,000. Because they had elected to have their claims treated as a single claim under subrule (H)(4), they were

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[37] Plaintiffs must rely upon the unspecified additional value attributed to the trial court's post-trial Order for Injunctive Relief to sustain their claim for case evaluation sanctions against Defendant Schmitt.

required to accept or reject that award *in toto*, and they chose to reject it without knowing whether the Defendants, or any of them, would accept or reject.[38]

Thus, the opportunity that the Plaintiffs were offered, and rejected, was to settle the case for $25,000. They did not accept the separate award against Defendant Rankin while rejecting as to Defendant Schmitt, and thus, they should not now be held entitled to case evaluation sanctions as if they had done so. The second sentence of subrule (O)(1) reflects a clear policy choice that a rejecting party should never be entitled to an award of case evaluation sanctions unless he has done better than the case evaluation award. The Plaintiffs have chosen to be treated as a single party, and as a group, they have **not** done better than the case evaluation award; indeed, they have fallen considerably short of what they could have received if all parties had accepted. Under these circumstances, an award of case evaluation sanctions against Defendant Rankin would defeat, rather than advance, the purpose of case evaluation.

IV. THE TRIAL COURT IMPROPERLY CONSIDERED ITS POST-TRIAL AWARD OF INJUNCTIVE RELIEF AS A BASIS FOR AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE.

Although the trial court properly recognized that Plaintiffs could not be awarded case evaluation sanctions based upon the jury verdict alone, its decision to do so was supported, instead, by the addition of an unspecified value attributed to its post-trial Order for Injunctive

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[38] MCR 2.403 (L)(1) requires each party to file his or her acceptance or rejection with the ADR clerk within 28 days after service of the panel's evaluation. MCR 2.403(L)(2) further provides that there may be no disclosure of a party's acceptance or rejection of the evaluation until after the expiration of the 28-day period, at which time the clerk shall send a notice indicating each party's acceptance or rejection.

Relief. Without this additional value, there was clearly no basis for an award of case evaluation sanctions against these Defendants.

Defendants Schmitt and Rankin have vigorously opposed the trial court's consideration of its post-trial injunctive order as the necessary basis for an award of case evaluation sanctions to the Plaintiffs on several grounds, but all of their arguments were rejected by the trial court. Although the Court of Appeals properly agreed that it was not "fair . . . under all of the circumstances" for the trial court to award case evaluation sanctions based upon its post-trial injunctive order, it rejected Defendants' other challenges to the trial court's decision on this point.

Defendants contend that the trial court's consideration of its post-trial injunctive order for this purpose was manifestly erroneous for a number of reasons. It was clearly inappropriate for the trial court to base its decision upon this unspecified and largely immeasurable value because MCR 2.403(O)(5) does not allow consideration of the court's supplemental Order for Injunctive Relief to determine Plaintiffs' entitlement to case evaluation sanctions in this case, and because that Order was not a part of the "verdict" for purposes of determining liability for case evaluation sanctions under MCR 2.403(O). This was also highly inappropriate because no request for any form of equitable relief was made in either of the Plaintiffs' Complaints, no such request was considered by the case evaluators, and Plaintiffs' motion for injunctive relief was not filed until **after** the jury's verdict had plainly established that it was Defendant Schmitt, not the Plaintiffs, who was entitled to case evaluation sanctions.

Under these circumstances, the trial court should have seen Plaintiffs' belated request for injunctive relief for what it was – a transparent attempt to shift the responsibility for

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payment of case evaluation sanctions away from where that responsibility properly lay. The Court of Appeals has correctly determined that the trial court erred in considering its Order for Injunctive Relief as a basis for the case evaluation sanctions awarded in this case because it was not "fair ... under all of the circumstances" to do so. Although the Defendants applaud this part of the Court of Appeals' decision, they contend that the trial court's decision was also erroneous for the additional reasons, discussed below, which the Court of Appeals rejected.

A. MCR 2.403(O)(5) DOES NOT ALLOW CONSIDERATION OF THE TRIAL COURT'S SUPPLEMENTAL ORDER FOR INJUNCTIVE RELIEF TO DETERMINE PLAINTIFFS' ENTITLEMENT TO CASE EVALUATION SANCTIONS IN THIS CASE.

The trial court awarded case evaluation sanctions to the Plaintiffs in this case based upon MCR 2.403(O)(5), which provides that:

> "If the verdict awards equitable relief, costs may be awarded if the court determines that,
>
> (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
>
> (b) it is fair to award costs under all of the circumstances."

It must be noted, at the outset, that the trial court's reliance upon this provision was misplaced because it does not allow consideration of equitable relief to support an award of case evaluation sanctions to the Plaintiffs under the circumstances of this case. Under MCR 2.403(O)(1), a party who has rejected a case evaluation award must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. An additional requirement applies, however, where both parties have rejected. In that case, a party who has rejected the award may still be awarded case evaluation sanctions against the

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opposing party if the opposing party is liable for payment of sanctions, *i.e.*, the verdict was **not** more favorable to the opposing party than the case evaluation award, **and** the verdict **was** more favorable to the party requesting sanctions than the case evaluation award:

> "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation."

The language of MCR 2.403(O)(5)(a) clearly suggests that its application was intended to be limited to the determination of whether the verdict was more favorable to the rejecting party against whom an award of case evaluation sanctions is sought. This subrule refers to a single "rejecting party" and provides that costs may be awarded where, "taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is **not more favorable** to the rejecting party than the evaluation." (Emphasis added)

Thus, the language of the rule itself makes it clear that an award of equitable relief may be considered only insofar as it may be relevant to support a finding that the verdict was **not more favorable** to the rejecting party against whom the award is sought. The rule does not erode the requirement of MCR 2.403(O)(1) that the verdict be **more favorable** to the Plaintiffs than the case evaluation award, nor does it include any language providing that equitable relief may be considered for purposes of determining whether the verdict was, in fact, **more favorable** to them. Presumably, if this Court had intended to allow consideration of equitable relief in determining whether a verdict was **more favorable** to a party seeking an award of case evaluation sanctions under subrule (O)(1), it would have used other language to express that intent. It did not.

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The Court of Appeals has grudgingly acknowledged that Defendants' argument in this regard is "technically correct," but has concluded, nonetheless, that "the trial court did not err in using MCR 2.403(O)(5) as a guide for this case, even though, by its terms, it does not technically apply." (Court of Appeals Opinion, p. 6) This rather surprising pronouncement is plainly at odds with this Court's most basic rule of construction. This Court has often noted that, when called upon to construe a court rule, the Court applies the legal principles governing the construction and application of statutes. Thus, the Court begins with the plain language of the rule in question and, as in cases involving construction of statutes, when the language is unambiguous, the court enforces the meaning expressed without further judicial construction or interpretation. Haliw v City of Sterling Heights, *supra*, 471 Mich at 704-705; Grievance Administrator v Underwood, 462 Mich 188, 193-194; 612 NW 2d 116 (2000).

In light of this very well established principle, it was manifestly erroneous for the Court of Appeals to proclaim, in a published Opinion, that subrule (O)(5) may be used "as a guide," in this case although "by its terms, it does not technically apply." This, alone, is ample cause for this Court's intervention. The Court of Appeals made no finding that the language of subrule (O)(5) was in any way ambiguous; indeed, it acknowledged that it "does not, by its terms, contemplate the situation presented here." (Court of Appeals Opinion, p. 6) Thus, the clear language of the rule should have been applied as written.

Plaintiffs have incorrectly characterized subrule (O)(5) as an exception to subrule (O)(1). This, clearly, is not the case. The language of subrule (O)(1) is clear and unambiguous, and contains no exceptions. The language of subrule (O)(5) is also clear and unambiguous, and contains no language suggesting that it was intended as an exception to subrule (O)(1) or any other provision. And, the second sentence of subrule (O)(1) is the more

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specific provision. Subrule (O)(5) addresses liability for case evaluation sanctions in general, where injunctive relief has been awarded. The second sentence of subrule (O)(1) is more specifically applicable to cases where both parties have rejected, and applies whether or not equitable relief has been awarded. Subrule (O)(1) includes both a general and a specific provision. The first sentence states the general rule that, if a party has rejected an evaluation and the actions proceeds to a verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. The second sentence of that provision is more specific, as it imposes a limitation applicable to a narrower class of cases – those cases where both sides have rejected.

B. THE TRIAL COURT'S POST-TRIAL ORDER FOR INJUNCTIVE RELIEF SHOULD NOT HAVE BEEN CONSIDERED A PART OF THE "VERDICT" FOR PURPOSES OF DETERMINING LIABILITY FOR CASE EVALUATION SANCTIONS.

Even if MCR 2.403(O)(5) allowed consideration of the trial court's post-trial Order for Injunctive Relief as a basis for awarding case evaluation sanctions to the Plaintiffs, the trial court's consideration of that Order for that purpose was inappropriate because that Order cannot be properly considered a part of the "verdict" for purposes of determining liability for payment of case evaluation sanctions in this case. Under MCR 2.403(O), a rejecting party's liability for payment of case evaluation sanctions is dependent upon whether the "verdict" is more favorable than the case evaluation award. Again, MCR 2.403(O)(1) provides that:

> "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation."

For purposes of this rule, the term "verdict" is defined by MCR 2.403(O)(2) as:

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"(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation."

The trial court's post-trial grant of injunctive relief does not constitute a part of the "verdict," as defined by this provision. Clearly, it was not a part of the jury verdict. Nor did it constitute a "judgment by the court after a non-jury trial" because there was no non-jury trial in this case. As noted previously, Plaintiffs had demanded their right to a jury trial, and thus, the case was tried to a jury. Plaintiffs did not make any request for a separate trial as to any issue or claim pursuant to MCR 2.505(B), and thus, no separate trial or bifurcation of the trial proceedings was ordered. Furthermore, the trial court's Order for Injunctive Relief was not made a part of the trial court's judgment. That Order (Plaintiffs' Application, Exhibit "K") was entered separately on February 9, 2004. The trial court's separate Judgment (Plaintiffs' Application, Exhibit "E") was entered in accordance with the jury's verdict the next day, on February 10, 2004.

Plaintiffs have maintained, however, and the Court of Appeals has agreed, that the trial court's Order for Injunctive Relief was a part of the "verdict" under MCR 2.403(O)(2)(c) because it may be considered a "judgment entered as a result of a motion after rejection of the case evaluation." This conclusion is erroneous for two reasons. First, because the trial court's grant of injunctive relief was not a part of the Judgment entered in this matter, it cannot be considered a "judgment entered as a result of a motion after rejection of the case evaluation."

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Thus, by its clear terms, subrule (O)(2)(c) does not encompass the trial court's separate Order for Injunctive Relief.[39]

Second, the Court should recall that this part of the court rule definition of "verdict," was added by amendment in 1987, and further refined by additional amendments adopted in 1997. As this Court recently noted in the case of Haliw v City of Sterling Heights, *supra,* the purpose of the 1997 amendment was to clarify that mediation (now case evaluation) sanctions may be assessed in cases where a judgment has been entered as a result of a trial court's ruling on a dispositive motion:

> "In 1997, this Court amended MCR 2.403(O) and changed the phrase in MCR 2.403(O)(1) from "the action proceeds to trial" to "the action proceeds to verdict." In support of its conclusion that appellate fees and costs are recoverable, the Court of Appeals relied on this amendment. The Court of Appeals reasoned that because this Court "de-emphasiz[ed]" a trial as the "determinative proceeding," this Court somehow intended that appellate attorney fees and costs should now be recoverable as case evaluation sanctions. *Haliw, supra* at 698. However, the purpose of the 1997 amendment was narrower than that assumed by the Court of Appeals and, thus, the amendment does not support the Court of Appeals rationale.
>
> "**Until this Court amended MCR 2.403(O) in 1997, it was sufficiently unclear whether a judgment that entered as a result of a dispositive motion instead of a trial would engender sanctions. By amending the court rule, this Court clarified that case evaluation sanctions may indeed be available when a case is resolved after case evaluation by a dispositive motion.** As such, the Court of Appeals analysis went beyond the intent of the 1997 amendment and the actual language used in the amendment."
>
> 471 Mich at 708-709 (Emphasis added)

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[39] In support of their argument that the trial court's injunctive Order may properly be deemed a "judgment entered as a result of a motion after rejection of the case evaluation," Plaintiffs have relied upon MCR 3.310(H), which provides that an injunction "may also be granted before or in conjunction with final judgment on a motion filed after an action is commenced. This provision does not support Plaintiffs' position, as its language plainly recognizes that there may often be a clear distinction, as there is in this case, between a "Judgment" and a separate Order granting injunctive relief.

Thus, it may be seen that the clear purpose of MCR 2.403(O)(2)(c) is to allow assessment of case evaluation sanctions in cases where a judgment has been entered as a result of a trial court's ruling on a dispositive motion made after rejection of a case evaluation award. It is difficult to imagine that this provision was intended to be used, as it has been in this case, to provide an after-the-fact basis for an award of case evaluation sanctions in a case such as this, where the matter has been tried, and the jury's verdict is insufficient to support an award of case evaluation sanctions.

The Court of Appeals cited this Court's decision in Marketos v American Employers Insurance Co., 465 Mich 407; 633 NW 2d 371 (2001) as support for its conclusion that the trial court's separate Order for Injunctive Relief was a "judgment entered as a result of a ruling on a motion after rejection of the case evaluation," and thus, a part of the "verdict." The Defendants contend that the Court's reliance upon Marketos was misplaced, because the material facts of that that case are dramatically different from the facts of this case. Marketos did not involve a post-trial attempt, like one made here, to obtain additional relief, not requested in the pleadings or addressed at trial. The Court merely held, in that case, that the trial court had properly applied setoffs against the jury's factual findings regarding the value of the property at issue in determining the amount of the "verdict" for purposes of MCR 2.403(O). Those setoffs included credits for mortgage payments made by the defendant insurer on the property in question, and reductions required by the terms of the policy at issue regarding deductibles and policy limits.[40]

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[40] It is noteworthy that in Marketos, the jury was specifically instructed that these setoffs would be determined and applied by the court as a matter of law. 405 Mich 413-414.

The Court's focus in Marketos was on whether the amount of the "verdict" could properly be adjusted by these setoffs, applied by the court as a matter of law, and the Court appropriately determined that "For purposes of awarding sanctions under MCR 2.403(O), a "verdict" must represent a finding of the amount that the prevailing party should be awarded." 456 Mich at 413-414. The Court's Opinion in Marketos does not mention subrule (O)(2)(c), nor does it contain any discussion as to whether the trial court's application of the setoffs constituted "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation."

Obviously, the material facts of this case are very different. Here, the trial court's post-trial award of injunctive relief was not an adjustment of the jury's factual findings to determine the amount of money to be awarded in the court's judgment. It was, instead, a supplemental award of additional and different relief that was never requested in the pleadings or addressed at trial. Indeed, as Defendants have noted previously, the relief granted in the trial court's Order for Injunctive Relief was not even requested until **after** the jury's verdict had made it clear that the Plaintiffs were not entitled to the award of attorney fees that they had hoped for. Thus, it may be seen that the issue presented in this case was simply not addressed at all in Marketos.

For all of these reasons, the Defendants contend that the trial court's separate Order granting Plaintiffs' post-trial request for injunctive relief cannot be considered a part of the "verdict" under MCR 2.403(O)(2), and thus cannot be considered as a proper basis for assessment of case evaluation sanctions in this case under any circumstances.

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C. IT WAS INAPPROPRIATE FOR THE TRIAL COURT TO BASE ITS AWARD OF CASE EVALUATION SANCTIONS UPON ITS POST-TRIAL ORDER FOR INJUNCTIVE RELIEF WHERE PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF WAS NOT CONSIDERED BY THE CASE EVALUATION PANEL.

Neither of the Plaintiffs' Complaints contained any request for equitable relief of any kind. Thus, it is clear that the case evaluators did not consider any claim for injunctive relief in determining their award. Because Plaintiffs' subsequent request for injunctive relief was not considered by the case evaluators, it was manifestly inappropriate and fundamentally unfair to award case evaluation sanctions based upon a grant of injunctive relief which was not ordered, or even requested, until after the jury's verdict had made it plain that it was Defendant Schmitt, not the Plaintiffs, who was entitled to case evaluation sanctions in this case. The Court of Appeals has properly concluded that it was not "fair ... under all of the circumstances" to award case evaluation sanctions to the Plaintiffs under these circumstances. Defendants agree with that conclusion, but contend that this was more than merely unfair; it was a clear denial of due process.

The question of whether a "verdict" can support an award of case evaluation sanctions logically presumes that the claims tried were the same as the claims submitted to case evaluation. In Beach v State Farm Mutual Auto Insurance Company, 216 Mich App 612; 550 NW2d 580 (1996), the Court of Appeals noted that "The mediation panel unanimously awarded $17,573.75 in plaintiff's favor on October 14, 1993. **Assuming that plaintiff raised the same issues at mediation and at trial,** the court should add to the $17,500 jury verdict all assessable costs . . in order to determine whether plaintiff improved his position by more than ten percent." 216 Mich App at 626 (Emphasis added). Similarly, in McCarthy v Auto Club Insurance Association, 208 Mich App 97; 527 NW2d 524 (1994), the Court observed

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that "**The only claim on which plaintiff prevailed at trial was that involving future plastic surgery, and that claim was never submitted to mediation. It necessarily follows that plaintiff was not entitled to mediation sanctions for prevailing in the trial court on the claims submitted to mediation, because she did not prevail on those claims in the trial court.**" 208 Mich App at 102 (Emphasis added) Accordingly, a "verdict" based upon a claim that was not submitted to the case evaluators cannot serve as the basis for an award of case evaluation sanctions. *See:* Miller v Village Hill Development Corporation, (Unpublished, Michigan Court of Appeals No. 220297); 2001 WL 754050, *lv den* 467 Mich 851 (2002)[41]

By basing its award of case evaluation sanctions upon claims which were not considered by the case evaluators, the trial court has denied the Defendants their constitutionally guaranteed right to due process of law. In civil proceedings, due process generally requires that the defendant be given notice of the nature of the proceedings, and that such notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Vicencio v Jaime Ramirez, MD, PC, 211 Mich App 501, 504; 536 NW2d 280 (1995).

The claims submitted to case evaluation in this case did not provide reasonable notice that an award of case evaluation sanctions could later be based upon unpled claims. As noted previously, the amount awarded for attorney fees in this matter accounted for a substantial portion of jury's damage award. The claim for attorney fees was not included in Plaintiffs' original Complaint, and was not made a part of Plaintiffs' claim for damages until their Complaint was amended during trial, long after case evaluation. Plaintiffs' request for

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[41] A copy of the Court of Appeals' decision in Miller is submitted herewith as Appendix "G."

injunctive relief was not included in either of Plaintiffs' Complaints, and was not made until **after** the jury had returned a verdict which would have entitled Ms. Schmitt, not the Plaintiffs, to an award of case evaluation sanctions. As the aforementioned authorities demonstrate, it was inappropriate, fundamentally unfair, and indeed, a denial of due process, to award case evaluation sanctions to the Plaintiffs in this case, where the "verdict" claimed to justify the award was based upon claims that were never considered by the case evaluators.

Plaintiffs have not disputed the fact that injunctive relief was not requested in either of their complaints. They have suggested, however, that this important circumstance is immaterial because Defendants were put on notice, by a pretrial statement and answers to interrogatories, that Plaintiffs might seek injunctive relief.[42] This argument misses the mark because Plaintiffs never substantiated their vague suggestions that injunctive relief might be requested by seeking to amend their complaint to request such relief. Defendants were afforded no formal notice that a request for injunctive relief would be made until **after** the jury's verdict. Thus, it is plain that Defendants had no proper notice that a request for injunctive relief was contemplated when the matter was submitted to case evaluation.[43] Defendants also had no notice, at that time, that the Plaintiffs would request an award of attorney fees as an element of damages. As noted previously, the Plaintiffs did amend their

[42] On Page 25 of their Application, Plaintiffs have suggested that the Defendants were also put on notice that equitable relief might be pursued by the statement, in Paragraph 37 of their Complaint, that their damages would include damages arising during the course of discovery. This, of course, did not provide any notice that the Plaintiffs might ultimately request equitable relief, as "damages" and equitable relief are fundamentally different remedies.

[43] Plaintiffs' reliance upon Dane v Royal's Wine & Deli, Inc., 192 Mich App 287; 480 NW2d 343 (1991) is misplaced, as the facts of that case are dramatically different. In that case, the plaintiff's separate claims for equitable relief were raised in his complaint, and thereby made known to the defendant and the mediators.

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complaint to request attorney fees as damages, but this amendment was not requested until the trial was well underway.

Under these circumstances, the Defendants were not fairly apprised of the nature and extent of the remedies that would ultimately be sought and awarded in this matter when the case was submitted to case evaluation. Under these circumstances, it was not fair, or consistent with due process, to base an award of case evaluation sanctions upon remedies which were not sought until much later. Under these circumstances, it is not reasonable to suggest, as Plaintiffs have, that Defendants should have anticipated the belated request for injunctive relief and called it to the attention of the mediators themselves.

It is also unpersuasive to suggest, as Plaintiffs have, that Defendants were not unfairly surprised because, although the requested **remedies** were considerably expanded, no new **claims** were raised. This argument overlooks the important fact that it is not the nature or the number of claims presented that determines a party's liability for case evaluation sanctions; it is the dollar amount of the "verdict," compared to the amount of the award. Clearly, a rejecting party is unfairly surprised if an award of case evaluation sanctions is made against her, based upon a "verdict" which includes additional elements of damages and/or other remedies that were not considered by the case evaluators or taken into account in the determination of their award.

D. THE TRIAL COURT'S RELIANCE UPON ITS POST-TRIAL ORDER FOR INJUNCTIVE RELIEF AS THE BASIS FOR ITS AWARD OF CASE EVALUATION SANCTIONS WAS NOT FAIR UNDER ALL OF THE CIRCUMSTANCES.

Even if were determined that MCR 2.403(O)(5) allowed the trial court to consider its post-trial Order for Injunctive Relief to determine Plaintiffs' entitlement to case evaluation sanctions in this case, that rule still required a determination that it was "fair to award costs

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under all of the circumstances." For all of the reasons previously discussed, Defendants contend that the trial court's decision can hardly be considered fair at all. It was, instead, fundamentally and shockingly **unfair** under the circumstances of this case.

The Court of Appeals properly determined that it was not "fair ... under all of the circumstances" to award case evaluation sanctions to the Plaintiffs because their belated claim for injunctive relief was neither pled, considered by the case evaluators, or addressed at trial. It was not fair to base an award of case evaluation sanctions upon a post-trial request for injunctive relief which was obviously contrived after the jury verdict as a means for the Plaintiffs to avoid their own liability for case evaluation sanctions. It was not fair at all to require the Defendants to pay $67,259.60 in case evaluation sanctions where the Plaintiffs should have been required to pay Ms. Schmitt's attorney fees and costs instead.

The Court should note, in this regard, that although a case evaluation panel cannot render an award on an equitable claim, it can consider such claims in determining the amount of its award. MCR 2.403(K)(3). It is entirely likely that the case evaluation award might have been less if the case evaluators had been aware that injunctive relief would also be sought and granted. It is also very possible that the Defendants might have accepted the case evaluation award if Plaintiffs' claim for injunctive relief had been properly disclosed and considered by the case evaluators. Defendants have been denied a reasonable opportunity to make an informed decision as to their acceptance or denial of the case evaluation award in this case. Having been denied that opportunity, they should not have been required to bear the consequences of events that they could not have foreseen.

Defendants contend that it was also unfair for the trial court to consider its post-trial Order for Injunctive Relief to determine Plaintiffs' entitlement to case evaluation sanctions in

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this case because the injunctive order entered in this matter cannot be objectively valued. It may be acknowledged that it might be appropriate to place a dollar value upon an injunction in some circumstances. This might be appropriate, for example, where a permanent injunction enjoins infringement of a trademark. In that case, the injunctive order can be objectively valued based upon the monetary value of the business that will be saved or reclaimed through its enforcement. Valuation of the injunctive order entered in this case is an entirely different matter. The Order for Injunctive Relief entered in this case, which will remain in effect for only 3 years, simply prohibits the Defendants from 1) sending letters or packages to Plaintiffs, 2) coming within ¼ mile of Plaintiffs' residences, 3) making phone calls to Plaintiffs, and 4) putting anything in Plaintiffs' mailboxes or driveways. Compliance with this Order costs the Defendants nothing, and its value to the Plaintiffs is completely intangible. It short, it was impossible to assign a dollar value to this injunction, and thus, it should come as no surprise that the trial court made no attempt to do so. Defendants contend that it was manifestly unfair for the trial court to base its award of case evaluation sanctions upon this injunctive order which defies objective valuation.

The Court of Appeals has also properly concluded that it was not "fair ... under all of the circumstances" to award case evaluation sanctions to the Plaintiffs, based upon the trial court's separate Order for Injunctive Relief, in light of the jury's prior award of attorney fees, left undisturbed by the trial court's unappealed Order denying Plaintiffs' motion for *additur*. The Defendants wholeheartedly agree that the trial court's decision was unfair for this reason as well, but note that the relevance of this circumstance extends far beyond the determination of fairness required under MCR 2.403(O)(5)(b). As Defendants have noted in their separate Application for Leave to Appeal presently pending under Docket No. 130574, the trial court's

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award of additional attorney fees as case evaluation sanctions improperly infringed upon, and effectively negated, Defendants' constitutional right to jury trial in this case, where evidence supporting Plaintiffs' claim for attorney fees as an element of damages had been presented to the jury at trial, the jury had rendered its award of attorney fees based upon the evidence and proper instructions, and the trial court had denied plaintiffs' motion for *additur* relating to the claimed insufficiency of the attorney fees awarded by the jury.

Plaintiffs have not responded to Defendants' argument that the trial court's supplemental award of attorney fees as case evaluation sanctions improperly infringed their constitutional right to jury trial in this case. They have merely stated that a non-duplicative award of attorney fees as case evaluation sanctions is permissible, citing this Court's decisions in McAuley v General Motors Corporation, 457 Mich 513, 524-525; 578 NW2d 282 (1998) and Rafferty v Markovitz, 461 Mich 265; 602 NW2d 367 (1999). However, as Defendants have noted in their separate Application, Plaintiffs' reliance upon McAuley and Rafferty is misplaced because the constitutional question presented here was not raised, discussed, or ruled upon, in either of those cases.

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RELIEF

WHEREFORE, Defendants–Appellees Joyce Schmitt and Diane Rankin respectfully request that the Plaintiffs–Appellants' Application for Leave to Appeal be denied, and that this Court grant leave to appeal, or other appropriate peremptory relief in lieu of granting leave to appeal, in relation to Defendants' separate Application for Leave to Appeal presently pending before the Court under Docket No. 130574. Alternatively, Defendants request that both Applications be granted, with the issues to be addressed on appeal limited to the issues concerning the validity of the trial court's award of case evaluation sanctions in this case and the Court of Appeals' rulings made in regard to those issues.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
Attorneys for Defendants–Appellees

By: _____

Graham K. Crabtree (P-31590)
Nicole L. Proulx (P-67550)
124 W. Allegan St., Suite 1000
Lansing, Michigan 48933
(517) 482-5800

Dated: March 3, 2006

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933